Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JOSE LUIS ESCALERA, an individual,

Petitioner,

v.

TIERCO WATER PARK, INC., d/b/a WHITE WATER BAY THEME PARK; and PREMIER PARKS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the state of Oklahoma violate federal laws that make the metric system the preferred system of measurement throughout the United States, thus denying petitioner his rights as a foreign national lawfully in the United States?

II. Did the Oklahoma court's ruling that defendants made the shallow pool into an open and obvious condition solely by marking it with a "3" impermissibly classify petitioner according to his national origin?

PARTIES TO THE PROCEEDING

Petitioner is Jose Luis Escalera, plaintiff in this action, appellant in the Court of Civil Appeals of Oklahoma, and Petitioner in the Oklahoma Supreme Court. Defendants and respondents here and below are Tierco Water Park, Inc., dba White Water Bay Theme Park; and Premier Parks, Inc.

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On July 25, 1999, the Journal Entry of the District Court of Oklahoma County, Oklahoma, was entered, pursuant to the district court's Order of June 25, 1999, granting the motion of Defendants-Respondents for summary judgment against Petitioner in his action against the Defendants for injuries he suffered that rendered him a quadriplegic. The judgment was affirmed on appeal by the Court of Civil Appeals of Oklahoma on December 10, 1999, and Petitioner's petition to the Oklahoma Supreme Court for a writ of certiorari to that court was summarily denied on March 14, 2000.

STATEMENT OF JURISDICTION

The order denying Petitioner's petition for a writ of certiorari to the Supreme Court of Oklahoma was entered March 14, 2000. The opinion of the Court of Civil Appeals finally determined the case on its merits. *See* Okla. R. Civ. Proc. 1.171, 1.178 (Westlaw 2000).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (Westlaw 2000)[1]. Petitioner has been denied his right to the equal protection of the laws and to his rights under the federal Metric Conversion Act of 1975, as amended in 1988, in violation of the protections guaranteed by the United States Constitution.

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1. Unless otherwise noted, statutory and regulatory references are to Westlaw 2000.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, art. VI, cl. 2

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

United States Constitution, Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Metric Conversion Act of 1975, 15 U.S.C. § 205a (Pub. L. 94-168, Dec. 23, 1975, 89 Stat. 1007)

The Congress finds as follows:

> **(1)** The United States was an original signatory party to the 1875 Treaty of the Meter (20 Stat. 709), which established the General Conference of Weights and Measures, the International Committee of Weights and Measures and the International Bureau of Weights and Measures.

(2) Although the use of metric measurement standards in the United States has been authorized by law since 1866 (Act of July 28, 1866; 14 Stat. 339), this Nation today is the only industrially developed nation which has not established a national policy of committing itself and taking steps to facilitate conversion to the metric system.

(3) World trade is increasingly geared towards the metric system of measurement.

(4) Industry in the United States is often at a competitive disadvantage when dealing in international markets because of its nonstandard measurement system, and is sometimes excluded when it is unable to deliver goods which are measured in metric terms.

(5) The inherent simplicity of the metric system of measurement and standardization of weights and measures has led to major cost savings in certain industries which have converted to that system.

(6) The Federal Government has a responsibility to develop procedures and techniques to assist industry, especially small business, as it voluntarily converts to the metric system of measurement.

(7) The metric system of measurement can provide substantial advantages to the Federal Government in its own operations.

§ 205b. Declaration of policy

It is therefore the declared policy of the United States —

(1) to designate the metric system of measurement as the preferred system of weights and measures for United States trade and commerce;

(2) to require that each Federal agency, by a date certain and to the extent economically feasible by the end of the fiscal year 1992, use the metric system of measurement in its procurements, grants, and other business-related activities, except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to United States firms, such as when foreign competitors are producing competing products in non-metric units;

(3) to seek out ways to increase understanding of the metric system of measurement through educational information and guidance and in Government publications; and

(4) to permit the continued use of traditional systems of weights and measures in nonbusiness activities.

Okla. Env., Health and Safety Reg. § 310:315-7-4(i)(1)

Depth Markings. The depth of water shall be plainly marked at or above the water surface on the vertical wall of the swimming pool and on

> the edge of the deck or walk next to the swimming pool, at maximum and minimum points; at the points of break between the deep and shallow portions; and at intermediate one-foot increments of depth in the shallow end up to the breakpoint; and at two-foot increments of depth from the breakpoint to the deep end wall, spaced at not more than 25 foot intervals measured peripherally; and at two-foot increments of depth (with at least three marker per pool) throughout the length of non-diving pools with uniform bottom slope.
>
> Depth markers shall be in numerals of four inches minimum height and a color contrasting with the background. Where depth markers cannot be placed on the vertical walls above the water level, other means shall be used, said markings to be plainly visible to persons in the pool area.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Jose Luis Escalera filed this action in Oklahoma County district court against the defendants Tierco Water Park, dba White Water Bay Theme Park ("Tierco"), and Premier Parks, Inc. ("Premier"), on December 16, 1997. The district court granted the motions of Tierco and Premier for summary judgment, which ruling was upheld on appeal by the Court of Civil Appeals of Oklahoma. *See* Appendix A. Petitioner's rehearing petition was denied, and Petitioner's subsequent petition for leave to appeal to the Oklahoma Supreme Court was summarily denied on March 14, 2000. *See* Appendix D at 23a.

B. Statement of Facts

Petitioner Jose Escalera was rendered quadriplegic as a result of a dive into a water slide catch pool at the water park operated by Tierco. Although it looked like a swimming pool, this pool was but three feet deep, was unsafe for diving, and had turbid water which concealed its depth. However, there were no signs warning against diving into it. Instead, the only sign at the pool was a depth marker consisting solely of the numeral "3," with no explanatory unit of measurement. The pool was large, approximately twenty-five feet by sixty-eight feet, with an extensive concrete apron. *See* Op. Ct. Civ. App., Appendix A at 2a-3a.

Escalera, who was born and raised to adulthood in Mexico, had never been to the facility before the date of the accident. His uncontradicted testimony showed that he understood the "3" on the sign to mean that the water was three *meters* deep, which would have made it safe for diving. He offered to prove that it was reasonable for him to understand that "3" meant "three meters," making diving safe, in view of the size of the pool, the lack of warnings against diving at that pool, the turbidity of the water, and the safety warnings displayed in other parts of the water park. *See* Appendix B at 10a-12a. Petitioner also offered to prove that other water parks operated by these defendants, as well as water parks operated by others, used signs listing the depth in both feet and meters. However, the Oklahoma courts refused to permit Petitioner to establish these facts, instead basing their rulings on the state policy that all measurements are understood to be in feet, state regulations requiring pool depth signs to be in "feet," and judicial notice that persons who remain in Oklahoma are, as matter of law, obliged to abide by that state's disregard for the federally mandated

preference for metric measurements. *See* Op. Ct. Civ. App., Appendix A at 2a-3a; Appendix B at 8a-9a.

Oklahoma Environmental, Health and Safety Regulations § 310:315-7-4(i)(1) require water depth to be plainly marked at a facility such as the one involved in this litigation. *See* 63 Okla. Stat. Ann. § 1-1014 (West 1999) (authorizing adoption of such regulations by the Oklahoma Commissioner of Health). However, these regulations as interpreted by the Oklahoma Courts require the markings to be feet rather than metric measurements, and do not require any qualifying notation on them to indicate that the number refers to the depth in feet. Instead, as construed by the Oklahoma Courts, these regulations, which apply to all public bathing facilities in Oklahoma, charge all persons who are in Oklahoma with knowledge that the federal policy favoring the use of the metric system throughout the United States is suspended in that state. *See* 63 Okla. Stat. Ann. § 1-1014. Moreover, the Oklahoma court ruled that all persons in that state must be aware that all pool measurement signs in Oklahoma are permitted to display the depth of the water only in feet. *See* Op. Ct. Civ. App., Appendix A at 3a.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF OKLAHOMA SYSTEMATICALLY VIOLATES THE FEDERAL STATUTE MAKING THE METRIC SYSTEM THE PREFERRED SYSTEM OF MEASUREMENT THROUGHOUT THE UNITED STATES, THUS DENYING PETITIONER HIS RIGHTS AS A FOREIGN NATIONAL LAWFULLY IN THE UNITED STATES.

The Oklahoma court ruled that even though Petitioner was raised in Mexico, where measurements of pool depths and similar labels are always in meters, the jury was not permitted to consider whether he reasonably believed that the "3" on the sign meant three meters, rather than three feet. *See* Op. Ct. Civ. App., Appendix A at 3a. Basing its ruling on the fact that Petitioner had "lived in the United States for the past 12 years," the court, effectively took judicial notice that despite his cosmopolitan background, Petitioner could not be a reasonable person exercising fair and impartial judgment when he reached the conclusion that the pool was three meters deep. *Id.*

In so ruling, the Oklahoma court ignored the well-established federal rules regarding measurement systems in the United States, and violated the Supremacy Clause by purporting to establish the primacy of Oklahoma law over the long-existing federal program to encourage the use of metric measurements throughout the United States. Moreover, the Oklahoma courts ignored the fact that all national and international swimming events are measured in terms of meters, including all diving events (such as the "3 meter springboard"), and that most other water parks in the United States and elsewhere also use signs using feet and meters. *See* U.S. Const., art. VI, cl. 2; 15 U.S.C. § 205a.

Oklahoma requires that depth signs such as the one at the pool in question be in feet, instead of metric measurements. *See* Okla. Env., Health & Safety Reg. § 310:315-7-4(i)(1). This regulation directly contravenes the federal Metric Conversion Act of 1975. *Compare* 15 U.S.C. § 205a *with* § 310:315-7-4(i)(1). Moreover, the Oklahoma court in this case took judicial notice that a foreign national from a country that uses the metric system — as do all industrialized nations save the United States — was barred from proving that the lack of warnings against diving, the unadorned "3" on the pool's depth sign, and the surrounding circumstances all combined to support his reasonable understanding that the pool was actually three *meters* deep, which would have been a safe depth for diving. *See* Op. Ct. Civ. App., Appendix A at 3a; *cf.* 15 U.S.C. § 205a.

The use of metric measurement standards in the United States has been authorized by law since 1866. *See* Act of July 28, 1866, 14 Stat. 339. And with the enactment of the Metric Conversion Act of 1975 (Pub. L. 94-168, Dec. 23, 1975, 89 Stat. 1007) ("the Act"), Congress made it clear that the United States should join the rest of the industrialized world in adopting metric measurements for commerce. *See* 15 U.S.C. § 205a. Among the aims that Congress announced with its adoption of the Act were the reduction of the competitive disadvantage in international commerce that resulted from the use of non-metric measurements; standardization and the "inherent simplicity" that results from universal use of the metric system in United States and world commerce; meeting the United States' responsibilities as an original signatory party to the 1875 Treaty of the Meter (20 Stat. 709), which established the General Conference of Weights and Measures, the International Committee of Weights and Measures, and the International Bureau of

Weights and Measures; and overcoming the disadvantage to domestic businesses that resulted from the use of non-metric measurements. *Id.*

In order to further the policies behind the Act, as well as to make clear its intent that the metric system become the primary system of measurement in this country, Congress amended the Act in 1988 to "designate the metric system of measurement as the preferred system of weights and measures for United States trade and commerce." *See* 15 U.S.C. § 205b(1), Pub. L. 100-418, Title V, § 5164(b), Aug. 23, 1988, 102 Stat. 1452. Moreover, the 1988 amendment provided that by 1992, the federal government must "use the metric system of measurement in its procurements, grants, and other business-related activities except to the extent that such use is impractical or is likely to cause significant inefficiencies. . . ." 15 U.S.C. § 205b(2).

Ignoring the long-established federal policy favoring metric measurements reflected in these statutes, the Oklahoma court in this case judicially noticed that the preferred system of measurement in this country is feet and not meters. *See* Op. Ct. Civ. App., Appendix A at 2a-3a. The state court went on to hold that, because Petitioner had lived in the United States for twelve years, he was bound as a matter of law to recognize that an unqualified number on a depth sign could not refer to a metric measurement. *See* Op. Ct. Civ. App., Appendix A at 2a.

This ruling, reflecting Oklahoma's statutory preference for using feet instead of metric measurements, violates the Supremacy Clause, for it directly affects and inhibits the federal policy announced in the Act. The ruling establishes Oklahoma as a state outside the requirements of the Act,

and purports to establish Oklahoma, and not Congress, as the final arbiter of what system of weights and measures shall be established in the United States. This disdain for federal statute and policy on the part of the state of Oklahoma should not go unchecked, or it will undermine the goals of uniformity, simplicity and fair competition in commerce that Congress announced in the Act. Thus, the Oklahoma law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Act. *See Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941). Moreover, Oklahoma's construction of its laws makes "compliance with both federal and state regulations into a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18, 10 L. Ed. 2d 248 (1963); *see* U.S. Const., Art. VI., Cl. 2. In sum, Oklahoma's insistence on the exclusivity of non-metric measurements runs afoul of the Supremacy Clause, for it drastically interferes with the objectives and purposes of the Act, which has been the law of the land for over a quarter of a century.

Other states faced with similar issues have disagreed with Oklahoma's narrow rejection of the metric system. Thus, nearly thirty years ago, Mississippi "jointly recognized" the metric system and the system of weights and measure then in customary use in the United States. *See* Miss. Code § 75-27-5 (1972).[2] Other states have taken a similar approach, adopting statutes that require clear

2. Oklahoma enacted a similar statute in 1976, but the regulations at issue in this case, which mandate "feet" as the measurement for public bathing signs, were adopted in 1986. Compare 2 Okla. St. Ann. § 5-61b, (Laws 1976, c. 108, § 2), with Okla. Env., Health and Safety Reg. § 310:315-7-4(i)(1) (adopted 1986 by Okla. State Bd. of Health).

identification of the measurement standard being used, and in some instances, mandating the display of conversion information between the metric system and another system. *See People v. Choi*, 167 Cal. App. 3d Supp. 6, 9, 213 Cal. Rptr. 205, 216 (1985).

Litigation resulting from the confusion caused by the use of different measuring systems is hardly novel, but other courts treat the issues as matters of fact to be resolved at trial. *See, e.g., McDermott v. Middle East Carpet Co.*, 811 F.2d 1422 (11th Cir. 1987) (action on contract to build carpet manufacturing plant, where plant was built for materials measured by metric system, but materials were ordered in twelve-foot widths). And it is not at all unusual for cases to discuss issues in terms of both metric and non-metric systems, with appropriate conversions indicated in the text. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 311 n.7 (D.C. Cir. 1981) (explaining issues in Clean Air Act case concerning heat energy in terms of both metric nanograms per joule (ng/j) and Million British thermal units (MBtu)).

In contrast, Oklahoma rejected the federally mandated switch to the metric system, instead clinging to a former system of measurement to the exclusion of the metric system. As explained above, Oklahoma's pool safety regulations, adopted by the Oklahoma State Board of Health, require water depth to be plainly marked at a facility such as the one involved in this litigation, but require the markings to be in feet instead of metric measurements. *See* Okla. Env., Health & Safety Reg. § 310:315-7-4(i)(1), requiring depth markings to be in feet. Relying on this expression of state policy, the Oklahoma court determined as a matter of law that the numeral "3" necessarily meant feet, despite all the evidence to the contrary. *See* Op. Ct. Civ. App., Appendix A at 3a.

Certiorari should be granted to resolve this conflict among the states in their approaches to implementing the Metric Conversion Act of 1975, and to consider whether Oklahoma's deliberate flouting of the federal statute that requires adoption of the metric system as the "preferred system" of measurement in the United States violates the federal rights of Petitioners and others who are similarly situated. *See* 15 U.S.C. § 205a.

II. THE OKLAHOMA COURT'S RULING THAT DEFENDANTS MADE THE SHALLOW POOL INTO AN OPEN AND OBVIOUS CONDITION SOLELY BY MARKING IT WITH THE NUMERAL 3 IMPERMISSIBLY CLASSIFIED PETITIONER ACCORDING TO HIS NATIONAL ORIGIN, AND IS IN CONFLICT WITH PRIOR RULINGS OF OTHER STATE HIGH COURTS.

Supposed "inherent differences" have long been rejected as a ground for classifications based on race or national origin. *See Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Thus, for example, "the exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." *Hernandez v. Texas*, 347 U.S. 475, 479, 74 S. Ct. 667, 671, 98 L. Ed. 866 (1954).

Federal policies against discrimination on the basis of improper classifications, such as one's national origin, are well-established. For example, 42 U.S.C. § 1981 forbids all racial discrimination in the making of private and public contracts. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987). And the

"framework" developed in Title VII cases has been applied to claims brought under this statute. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1), prohibits discrimination on the basis of an employee's age, and this Court has noted that its "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.' " *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985) (*quoting Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, prohibiting discrimination under any federally funded education program or activity, is yet another example of the federal policy forbidding discrimination on grounds such as race, sex or national origin. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (relying on *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), a Title VII case).

Here, Petitioner's status as a foreign national who had spent time in this country was used to deprive him of his right to establish the facts that support his claim. Petitioner sought to show that based on his experience and background, the unadorned "3" on the side of the pool operated by the defendants was not, by itself, an adequate warning to him of the dangers of diving into the pool, and that he reasonably believed that the "3" meant the pool was three *meters* deep. *See* Appendix B at 10a-12a. However, the Oklahoma courts rebuffed his efforts to establish the fact that his belief derived

in part because he was raised in Mexico, where he learned that water depths are measured in meters. Instead, the court below found that merely because Petitioner had lived in the United States for the past twelve years, Petitioner would be denied his right to establish the facts that supported the reasonableness of his belief. *See* Op. Ct. Civ. App., Appendix A at 3a.

Petitioner was thus classified according to his national origin, in violation of the Fourteenth Amendment and federal policies forbidding such classifications, and the Oklahoma courts have made it clear that this classification is the law that will be applied in that state. Certiorari should be granted to consider whether this classification deprives foreign nationals and others in Oklahoma their right to the equal protection of the laws regarding the use of measurement systems in the United States.

CONCLUSION

For the reasons stated above, this petition is well taken and should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION I DATED AND FILED DECEMBER 10, 1999

THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
DIVISION I

Case No. 93,481

JOSE LUIS ESCALERA, an individual,

Plaintiff/Appellant,

vs.

TIERCO WATER PARK, INC., d/b/a WHITE WATER BAY THEME PARK; and PREMIER PARKS, INC.,

Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
HONORABLE NANCY L. COATS, JUDGE

* * *

OPINION

Opinion by Carol M. Hansen, Presiding Judge:

On August 30, 1997, Plaintiff, Jose Escalera, a 29 year old man, dived head first into a three foot "catch pool" at White Water Bay. He hit his head on the bottom of the pool,

breaking his neck and rendering him a quadriplegic. Plaintiff sued Defendants, Tierco Water Park, Inc., d/b/a White Water Bay Theme Park, and Premier Parks, Inc. In his petition, Plaintiff alleged he was an invitee on Defendants' premises, that he sustained serious injury when he dived into the pool, and, as a result suffered great pain of body and mind and incurred medical expenses. He demanded judgment from Defendants in excess of $10,000.00. The trial court granted Defendants' motion for summary judgment. Plaintiff appeals.

In his petition in error, Plaintiff contends the trial court erred in granting Defendants' motion for summary judgment because there were material questions of fact regarding whether the depth of the pool was an open and obvious condition. An invitor's duty of ordinary care and/or duty to keep the premises in a reasonably safe condition extends only to hidden dangers, defects, traps, snares, pitfalls and the like that are not known to the invitee. *Esther v. Wiemer*, 859 P.2d 1140 (Okla. App. 1993). On the other hand, an invitor has no duty to protect or warn about dangers on its premises which are open and obvious and which should be discovered by the invitee in the exercise of ordinary care. *Phelps v. Hotel Management, Inc.*, 925 P.2d 891 (Okla. 1996).

In Plaintiff's deposition, he testified he saw the "3" depth marking on the apron of the pool and stood next to it for 45 seconds before diving into the pool head first. However, Plaintiff also testified that when he saw the "3" depth marking, he thought the "3" represented meters rather than feet. He testified the metric system of measurement is used in Mexico, where he was raised. Thus, he contends that because he was raised in Mexico, a jury may find he

reasonably assumed the depth of the catch pool was 3 meters, rather than 3 feet. We disagree. Inasmuch as Plaintiff has lived in the United States for the past 12 years, a reasonable person exercising fair and impartial judgment could not reach the conclusion the depth of the catch pool was 3 meters rather than 3 feet without further testing of the depth. *See Northrip v. Montgomery Ward & Co.,* 1974 OK 142, 529 P.2d 489.

Next, Plaintiff argues the trial court erred in granting Defendants' motion for summary judgment because there were questions of fact regarding whether he knowingly assumed the risk. The defense of assumption of the risk need not be submitted to the jury where the plaintiff fails to present evidence tending to show primary negligence on the part of the defendant and where, upon undisputed facts, reasonable people exercising fair and impartial judgment could not reasonably reach differing conclusions concerning them. *Flanders v. Crane,* 1984 OK 88, 693 P.2d 602. In this case, Plaintiff failed to present evidence tending to show primary negligence inasmuch as Defendants had no duty to warn because the depth of the pool, clearly marked with "3" was an open and obvious condition. Thus, we do not reach the issue of whether Plaintiff knowingly assumed the risk. For the reasons discussed above, the trial court did not err in granting Defendants' motion for summary judgment.

AFFIRMED.

JONES, C.J. and ADAMS, J., concur.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS OF THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA DATED JUNE 25, 1999

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY, STATE OF OKLAHOMA

Case No. CJ-97-8712

JOSE LUIS ESCALERA,

Plaintiff,

vs.

TIERCO WATER PARK, INC. d/b/a WHITE WATER BAY THEME PARK and PREMIER PARKS, INC.,

Defendants.

SEVENTH JUDICIAL DISTRICT OF OKLAHOMA
TRANSCRIPT OF PROCEEDINGS
HAD ON THE
25TH DAY OF JUNE, 1999
BEFORE THE HONORABLE NANCY L. COATS
DISTRICT JUDGE

* * *

[3] (On June 25, 1999, with Court and Counsel present, the following proceedings were had:)

THE COURT: In this particular matter Escalera is the plaintiff, vs. Tierco Water Park d/b/a White Water or White Water Bay Theme Park. The Court has before it the

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Defendant's Motion for Summary Judgment, the Plaintiff's Response to Defendant's Motion for Summary Judgment and the Defendant's Reply to the Response to Defendant's Motion for Summary Judgment. Those are all the documents that I have unless there's been something else that didn't get furnished to me.

MR. DENNEY: Your Honor, I have with me this morning that we have filed, or caused to be filed today, a supplemental exhibit which is no more than just a compilation to assist the Court this morning in the hearing of the items contained in plaintiff's statement of facts.

THE COURT: Let me just start out by saying I have a little problem sometimes on these Rule 13(b) motions because I get a motion for summary judgment and it sets out what one side alleges is the material facts not in dispute. And then the other side comes up with material facts not in dispute which in my opinion does not comply with the requirements of Rule [4] 13(b) because I am under the impression you are to let me know which of the material facts that they allege are undisputed are those which you think are disputed.

MR. DENNEY: Well, your Honor, if I may address that issue. I've looked carefully at Rule 13 to deal with that same issue because the defendant raised that in their reply. And as it's set out the federal rules from which Rule 13 came, and the adopted case law that follows it, controversion (sic) of the defendant's facts can occur in two different matters.

It can occur by the plaintiff setting out facts that are different than the defendant's facts which we have done in

great length and detail. It can also occur by the plaintiff setting out the different inferences from those facts.

Now I agree with the Court that some lawyers have the style of simply coming in and taking and saying plaintiff — the defendant says this and I say this or defendant says this and I say this. However, in this case for us to have attempted to do that given the simplicity of their stated facts and the complications of the issue of diving safety would have left the Court derift (sic) of many facts and knowledge that the Court needs to analyze the issue of liability on [5] behalf of this defendant. To do so would leave the Court making decisions out of context set out by the defendant that's not complete and that's the reason we've done it.

What I've given you in way of a table, your Honor, is more of what your Honor is talking about. It's simply to show your Honor where we have controverted facts on a fact by fact basis.

THE COURT: I guess what I'm wanting is for lawyers to make my job as easy as possible. And when it's neatly set out 1, 2, 3, 4, 5, these are the material facts that you allege are undisputed and then if you totally ignore them and come back with some other facts it's not as neat as I would like to have.

MR. DENNEY: I understand. That's why I prepared this table for your Honor this morning.

THE COURT: Well, I guess I have a little bit of a problem of lawyers coming in on the day of the hearing and

asking me to look over something else when I have really spent considerable time reading over all of the documents that have previously been furnished to me. And I think I've read all 80 of your alleged undisputed facts, material facts or whatever they are. But I didn't find that you really had responded in a concise written manner to the material [6] facts as to which you contend a genuine issue exists. I guess I'm spending more time on form than substance here, but I sometimes think that one of the reasons you're doing that is for something other than maybe what you're really doing it for, but maybe — do you dispute any of the material facts?

MR. DENNEY: Absolutely, your Honor. We dispute the most basic underlying material facts.

THE COURT: Well, I did not pick up on that in your response that was filed, but be that as it may I think I've made myself clear on that. I guess I'm looking for simplicity with respect to responses under 13(b), but I think your argument is well taken with respect to our rule coming from the federal rules and perhaps you can do it by inference. It's just a little mirkier that way.

MR. DENNEY: Well, I intended to do it this morning by specific reference rather than inference and I — we have the facts contained that are absolutely contrary to the facts as stated by the defendants.

THE COURT: Well, there are some facts to which you do agree that this was a grown man standing on the edge of a catch pool at a water park with the number "3" written down there and he dives into the [7] water and comes out a quadriplegic.

MR. DENNEY: That's a basic fact.

MR. DONCHIN: Yes, your Honor.

THE COURT: And then we get into whether it's open and obvious, whether there's a duty, whether there's an assumption of risk. I think that, as I've been through some of these, I think that some of the material facts that were represented on behalf of the plaintiff were sort of isolated statements taken out of the depositions but didn't really give me the clear picture because I think sometimes lawyers tend to pick out a statement that supports their particular position — without giving me the context.

And I do think in this case the plaintiff had been to similar water parks a few times. There is some information that he had been to one at least in Tulsa. There's no doubt that there was a depth marker number on the pool edge. Whether the plaintiff being of Hispanic origin was confused by the number "3" as to whether it meant liters or feet of course is something you're relying upon heavily. Whether there's a duty on behalf of the water park to put the numeral "3" as a depth marker in languages and meters and other measurements to notify people from other countries seems to go beyond any requirements.

[8] I don't think there's any question in respect to your, on both sides, that there was any law or any code or any standards that were violated. I think that both of you agree, although you spent a lot of time talking about things along those lines.

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There's no doubt that the plaintiff could see others in the catch pool at the time that he dove, although there certainly seems to be an agreement that he couldn't see the bottom of the pool at the time he dove. He did see others exiting the pool or floating around on inner tubes. The water apparently was turbid at that point. There were rails and some steps leading out of the water, I believe, from which a reasonable person might be able to gather information as to the depth of the water.

Plaintiff knew and admitted that he knew he could be injured by diving into water of an unknown depth. I guess I'm inclined here to rule in favor of the Defendant's Motion for Summary Judgment because of the things I've just mentioned in addition to what they have set out in their brief, that there was an open and obvious situation here. The plaintiff assumed the risk by diving head first into water where he could not see the bottom. I would be happy to hear your response.

[9] MR. DENNEY: May I respond?

THE COURT: Yes, sir.

MR. DENNEY: I want the record clear, your Honor, I've got some things with me this morning that I want to, in spite of the Court's admonition, refer the Court to that I think this Court can take judicial notice of.

As I set out in my brief, or Mr. Loftis set out in our brief, as far back as 1875 the United States was the original signator of the treaty that adopted the metric system as the

measurement — as the superior system of measurement to be used in this country.

Since then there has been specifically adopted by the United States Congress two laws that have been referred to in my brief that make the metric system the preferred system of measurement and those were the preferred system of measurement in the United States.

The defendants make the statement, and I frankly believe the writer of the brief was quite racist in this statement, that if you come to America you must use feet and inches. You may not be a Hispanic who relies on meters. As the Court knows this country is an amalgamation of many different countries of persons who come here quite commonly and visit water parks.

[10] As great an institution as the United States Air Force in recruiting, your Honor, uses the metric system as evidence to this Court by one of their advertisements that I'm showing you on a ruler that includes the metric system and metric conversions in this country.

The question raised by the inference of that is this, your Honor, does a "3" mean anything? And the defendant's expert, the affidavit of my expert and the testimony of Mr. Escalera clearly establishes that the persons from metric countries a "3" is known to mean meters. Three meters is 9 feet as your Honor knows, or slightly more than that. And that would be true to 90 percent of the world, your Honor, not just in the United States where the preferred system adopted by Congress is the metric system. Therefore, a "3"

without a unit, which is the problem here, a simple "3" is not a plain marking of depth required by the Oklahoma statutes under anybody's interpretation.

As we showed the Court at all the other parks, Premier Parks, they use feet and meters to clear that discrepancy up so that there would be no difficulty with ascertaining what a "3" means. I suggest, your Honor, a "3" could also mean there are three slides in this pool which there are three slides in this pool. [11] It may mean pool number three. It may mean a lot of different things, but it does not plainly tell anyone that cannot see the bottom that the depth is 3 feet.

And the law that your Honor must interpret this morning is the law of the state of Oklahoma that simply says if conflicting inferences may be drawn from the facts and circumstances and evidence as to whether the offending hazard did have a deceptively innocent appearance or to the extent could not be anticipated neither the trial court nor this court can make it clear that the peril was obvious and apparent.

And that takes your Honor to the testimony, the sworn testimony of Lucia De Lara, your Honor, which is the question of whether or not a conflicting interest can be drawn. And if I may refrain from giving the Court a short course in what intervening cause is what the defendant really argues here is contributory negligence as intervening cause and I'll tell you why.

The original act of negligence in this case are the acts of the park and the liability. As far back as 1990, the Consumer

Products Safety Commission of the United States notified the purveyors of water parks that signs in areas where diving may occur [12] should be posted both at the entrance to the park and at the side of the pool where diving may occur and that comes from studies done by the Consumer Products Safety Commission contracted with the National Pool and Spa Institute.

And they specifically said in their warning sign located in a place where diving is prohibited represent the last opportunity to communicate with a person who's contemplating a dive. Information improperly communicated could cause the individual to alter the intent to dive. And they go on to say, your Honor, that the first pool rule should be posted. The second categories of signs are the ones related to either a specific activity such as diving or rules pertaining to the use of specific —

THE COURT: Are you reading from some material other than what's been furnished to the Court?

MR. DENNEY: I am, your Honor.

THE COURT: I find that unacceptable. I'm ruling on what's been furnished to me.

MR. DENNEY: I am simply establishing for your Honor the format within which the intervening cause defense has raised, your Honor.

THE COURT: If you're trying to interject [13] into your argument some standards or references to standards that have

not been submitted to me and on which I have not based my opinion I find it inappropriate. I'm going to go ahead and grant Defendant's Motion for Summary Judgment.

MR. DENNEY: Can I finish my argument, your Honor?

THE COURT: If you're going to base it on material that you furnished to me, but if you're bringing in some outside material that I haven't had an opportunity to review or if the other —

MR. DENNEY: Your Honor, the material —

THE COURT: — or if the other side has not had an opportunity then I —

MR. DENNEY: The material I'm referring to is attached to my brief as Exhibit D.

MR. DONCHIN: That's not what you were reading from.

THE COURT: You were reading from some sort of —

MR. DENNEY: I'm reading from the original study which came from Consumer Products Safety Commission.

THE COURT: Let me just say that I think that I reviewed most of all the material that's been [14] furnished to me and I think that I'm ready to rule on this material. And I find that the Defendant's Motion for Summary Judgment should be granted.

MR. DENNEY: Well, I would like for your Honor to deny my request that my record be complete on the record because I have additional materials that I would like to cover, your Honor.

THE COURT: Is it material that you furnished to the Court?

MR. DENNEY: Yes. It's right out of the record of this case.

THE COURT: And you want to further argue it?

MR. DENNEY: Yes.

THE COURT: Go ahead.

MR. DONCHIN: If I may ask counsel if he's going to read from a document that he says was submitted to you I would like to know where it is.

MR. DENNEY: The testimony of the lifeguard set out in plaintiff's enumerated facts establishes, your Honor, that — and the position of the defendant is as to this man's —

THE COURT: Do you want to refer to a particular exhibit?

MR. DENNEY: That's set out in our facts, [15] your Honor, in our statement of facts in our brief. Establishes a position of the defendant that Mr. Escalera stood at the side of the pool for 45 seconds. The lifeguard has admitted and

testified as set out in her facts that she should not allow him to stand there, she should warn him back from the edge of the pool. The lifeguard has admitted that if she follows her 10/20 rule, and that is to scan the pool every 10 seconds and to act within 20 seconds in response to a hazard, that she would warn somebody back. She looked and saw him there every ten seconds. That would be violated four times before this alleged diving act occurred by the position of the defendant.

The testimony of Lucia De Lara provided to you in our exhibits established that it's her position — and she is, by the way, not an 8-year-old, she is a 13-year-old young lady — establishes that she believes her uncle to have stood there for two minutes. That would violate the 10/20 rule 20 times, that the lifeguard should have warned him back from the side of the pool.

That establishes, your Honor, a format of negligence that precedes Mr. Escalera's act. And my purpose for mentioning that is in a intervening cause [16] defense which is what this open and obvious defense is, must be — if you will look at 9.8 of the Oklahoma rules, proposed jury instructions — must be independent of the acts of the defendant. This is not.

THE COURT: Was that something that was furnished to the Court? I didn't remember seeing that reference.

MR. DENNEY: I don't need to furnish your Honor the OUJI instructions. The Court can certainly take judicial notice of the OUJI instructions and the case law. The state of Oklahoma supports what an intervening cause is.

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Now an intervening cause which is what they allege here, your Honor, must be independent of the negligent acts of the defendant. The affidavit of my expert establishes, and it is attached to my materials, that the standards of the industry set out a level of negligence brought about when you fail to warn about diving in places where it's foreseeable.

And it clearly establishes that after visiting the park itself and being there he saw the people came (sic) off these slides head first in a diving position. And when they came off the slide they existed the opposite side of the pool on the steps [17] after floating across on tubes.

Now can the jury decide from that that the inference is that underneath the slide is deep and when you go across the pool it is shallow where you walk out to the steps? Of course they can decide that, your Honor. The fact that this pool is uniform on the bottom is not obvious as is set out in the testimony of Miss De Lara and Mr. Escalera who testified they couldn't see the bottom.

Your Honor makes the assumption that you would know the pool is uniform when you look at the steps all the way across from the slide. Remember that this dive occurred by the slide on that side, on the other side of the steps, that the person would automatically know that it's 3 feet deep. On the other side where the steps are would make it 3 feet deep where the slides are. That is simply not true. Most swimming pools are deeper on one side than the other, your Honor. And since most swimming pools are deeper on one side than the other and the steps are on the opposite side of the pool like almost every home pool in the United States the deep side would be opposite the steps.

Therefore, when Mr. Escalera looks across the pool and sees steps it is fair for the jury to know [18] from these inferences that he may believe he's on the deep side of the pool. That's my point. That makes it not open and obvious and the jury can infer facts from that which would cause a reasonable person to believe that he's standing on the deep side of the pool and he then looks and believes he's —

THE COURT: Do you think you can conclude your argument within two minutes?

MR. DENNEY: I just did.

THE COURT: Okay. Thank you. Would you like an opportunity to respond?

MR. DONCHIN: Just briefly for two minutes, your Honor. One is we have not brought this based on intervening cause. That is not the defense. The defense is whether it would be reasonable, whether the park had a duty to warn. And I know you've — I'm not going to repeat the facts because you've accurately set them out.

THE COURT: I will allow you an opportunity to make a record as I did the other side.

MR. DONCHIN: The — there was no duty to warn. And the standard is whether the premises' owner would reasonably expect the ordinary person using reasonable care to ascertain what the condition was. There is no question in this case. He's a 27-year-old [19] man. And, I'm sorry, I seem a little upset because there's a comment — I don't think

counsel meant it personally. But he's made a comment that we might be racist in implying — I truly don't believe he meant that as a personal attack and I'll give him the opportunity to tell me that.

MR. DENNEY: Well, I meant the writer of this brief —

MR. DONCHIN: Well, I wrote the brief.

MR. DENNEY: — who states that in America that we use feet and meters is implying that somebody Hispanic who relies on the metric system is doing something improper and that's racist. It's just that simple.

MR. DONCHIN: I don't even want to comment on it, your Honor. I am offended by it and I'll deal with him later on that. Your Honor, this is a question of whether you put — if you take all the facts away, if you take a person just out at the scene by a pool that's 3 feet deep with the number "3" by it, is it reasonable to conclude based on what he would see with the ladders and the steps and everything goes with it, would a reasonable ordinary person know not to dive head first and the answer is an unqualified yes.

[20] Mr. Denney made a comment about somebody coming off the slides and where this took place. This did not take place at the slides. It took place at the other end of the pool and that's well documented in the briefs. The plaintiff says that he stood — the plaintiff himself admits he stood next to that "3" for 45 seconds.

You can't put a wall around society. A person has to use reasonable care, and obviously he failed to do that. But past

his comparative negligence, was there a duty to warn in this case? We think the undisputed facts show there was no duty to warn.

For the record, plaintiff's counsel made a comment about how all other parks, Premier Parks, do this. They didn't go to all these other parks. They went to two parks down in San Antonio and Houston, South Texas, where the codes and ordinances require a different marking. The codes that's set forth in our brief which is undisputed show that it only requires the number "3." It doesn't require any distinction of feet or meter or anything like that.

To accept plaintiff's counsel's argument would make them change all the speed limit signs to say miles per hour where right now it just says speed limit 55. I mean, we don't live in that kind of [21] society. The rules aren't there. The codes aren't there. For them to — for you to accept their argument would require you, or in every business, to find out what all the city ordinances and codes are throughout the United States and comply with something that doesn't even exist in this state. I think that's all, your Honor.

MR. DENNEY: May I respond with a case, your Honor?

THE COURT: A brief reply, yes.

MR. DENNEY: Your Honor, the case is *Silkwood vs. Kerr McGee Corporation*. The cite is 104 Supreme Court 615. It establishes very clearly that in Oklahoma, certain ruling, compliance with state law does not abrogate you from common law liability for negligence. Mere compliance with state law in accordance with *Silkwood* is nothing more than

the meeting of minimum requirement. The jury may then even award punitive damages those who complied with state law and the rulings of the NLC in that case, the Court said. Even after making a finding that you have full compliance with both federal and state law the jury may award punitive damages in addition to finding for negligence.

The issue as set out by my expert and as set out [22] by the World Water Park Standards the jury may decide from the standards of this industry that a reasonable park would put a no diving sign at the edge of this pool. And it is very clear that a reasonable park would do that. This park does that in every other catch pool that they have that we have brought to the attention to the Court in our response.

The jury may then infer from that that they should have had one here. Mr. Escalera's undisputed testimony is if there had been a sign saying no diving he would not have dived. He can't assume the risk of a 3 foot deep pool when he testifies to this Court that he believed it to be 9 feet deep. The Court would have to find in the record that he knew it was 3 feet deep.

THE COURT: I thought it was also interesting that this plaintiff used in reference to distances the term "number of feet" and never used meters when he was describing other things, so be that as it may. Thank you very much and —

MR. DONCHIN: I'll draft a journal entry. Thank you, your Honor.

(END OF PROCEEDINGS)

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APPENDIX C — JOURNAL ENTRY OF THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA DATED AND FILED JULY 14, 1999

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-97-8712-61

JOSE LUIS ESCALERA,

Plaintiff,

v.

TIERCO WATER PARK, INC. d/b/a WHITE WATER BAY THEME PARK and PREMIER PARKS, INC.,

Defendants.

JOURNAL ENTRY

NOW ON THIS 25th day of June, 1999, the above-styled matter having come before the undersigned District Judge, with the parties represented by counsel, Plaintiffs by Richard Denny and Jim Loftis, and Defendants by David B. Donchin and Logan Johnson of Durbin, Larimore & Bialick, and the Court, having reviewed the briefs and having heard argument of counsel, finds that the Motion for Summary Judgment filed by Defendants herein should be and is hereby sustained as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is hereby granted, and that Judgment is hereby rendered on

behalf of Defendants and against Plaintiff, and that the clerk of this Court should enter judgment accordingly.

s/ Nancy L. Coats
JUDGE OF THE DISTRICT COURT

Approval page — attorneys' signatures — Motion for Summary Judgment

APPROVED:

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APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED MARCH 14, 2000

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, March 14, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

93,481 Jose Luis Escalera v. Tierco Water Park, Inc. d/b/a White Water Bay Theme Park et al.
Petition for certiorari is denied.
CONCUR: Hargrave, V.C.J., Hodges, Lavender, Opala, Watt, Boudreau, Winchester, JJ.
DISSENT: Summers, C.J., Kauger, J.

* * *

s/ Hardy Summers
CHIEF JUSTICE